



September 18, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Washington DC 20554

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SEP 21 1998

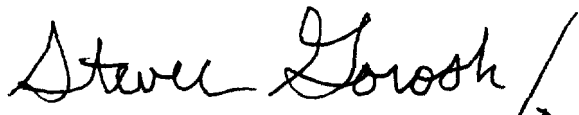
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Direct Case of Pacific Bell; CC Docket 98-103.

Dear Ms. Salas:

Attached are the original and four copies of the response of NorthPoint Communications to the Direct Case of Pacific Bell; CC Docket 98-103.

Sincerely,


Steven Gorosh
Vice President & General Counsel

DNJ

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SEP 21 1998

**Before the
Federal Communications Commission
Washington DC 20554**

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the matter of

Pacific Bell Telephone Company
Pacific Bell Tariff FCC No. 128
Pacific Bell Transmittal No. 1896

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CC Docket No. 98-103

**NORTHPOINT COMMUNICATIONS, INC.
RESPONSE TO DIRECT CASE OF PACIFIC BELL**

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September 18, 1998

**Before the
Federal Communications Commission
Washington DC 20554**

In the matter of)	
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Pacific Bell Telephone Company)	CC Docket No. 98-103
Pacific Bell Tariff FCC No. 128)	
Pacific Bell Transmittal No. 1896)	

**NORTHPOINT COMMUNICATIONS, INC.
RESPONSE TO DIRECT CASE OF PACIFIC BELL**

NorthPoint Communications, Inc., pursuant to the Order Designating Issues for Investigation in this matter,¹ hereby files its response to Pacific Bell's direct case. While it appears to be consistent with Commission precedent to treat the service as interstate, NorthPoint reiterates its strong concern that the Commission should require Pacific Bell to impute the loop and collocation costs that Pacific Bell imposes on its competitors. Otherwise, NorthPoint and other CLECs providing DSL service will continue to be subject to an existing "price squeeze" under which Pacific Bell's charges to NorthPoint for the unbundled network elements necessary to provide competitive DSL service are more than the full retail charge of Pacific Bell's service. Obviously, facilities-based competition cannot exist where it costs NorthPoint more for a piece of Pacific Bell's DSL service than it costs retail customers for the entire service. In order to ensure that broadband competition has a chance to develop, and ultimately ensure lower costs and greater choice,

the Commission should require Pacific Bell to impute the costs of collocation and loops into its federal tariffs. In the alternative, if the Commission is not willing to require imputation, it should defer to the states consideration of both Pacific Bell's wholesale and retail DSL charges so that the states may properly address price squeeze issues.

On June 15, 1998, Pacific Bell filed Transmittal No. 1986, with proposed rates, terms and conditions for Asymmetrical Digital Subscriber Loop (ADSL) service. On June 22, NorthPoint Communications, Inc. filed a Petition to Reject, or to Suspend and Investigate the proposed tariff. NorthPoint argued that Pacific Bell's proposed tariff did not appear to cover all relevant costs, and would create a price squeeze, and that jurisdictional issues complicate the analysis of the proposed tariff. On September 2, 1998, the Chief, Common Carrier Bureau issued an "Order Designating Issues for Investigation" to determine whether Pacific Bell's DSL service offering should be tariffed at the federal or state level.

It appears that Pacific Bell's ADSL service is designed to offer a dedicated data connection between an end user and an Internet service provider (ISP). An end user using DSL service for Internet access to an ISP may access a local web site, a non-local web site in the same state, and/or a web site in another state or country. Because of the worldwide nature of the web, it is likely that a majority of web sessions will include access to a web site in a different state or country, thereby rendering the call interstate in nature. In addition, because the ADSL line is dedicated, and flat-rated, it makes sense to have it tariffed in either the state or federal jurisdiction, but not both. In the past, the Commission

¹ Order Designating Issues for Investigation, CC Docket No. 98-103 (CCB September 2, 1998) ("Designation Order").

has asserted jurisdiction over calls to information service providers, largely as a way of preserving a competitive, unregulated environment for ISPs.² There has been some confusion about NorthPoint's position on jurisdiction and tariffing, and NorthPoint wishes to clarify that it has no objection to a Commission decision that ADSL is an interstate service.

There are practical consequences to federal tariffing, however, that the FCC should consider in making its decision in this proceeding. In its initial petition to reject, or suspend and investigate, NorthPoint noted that: (1) the proposed tariff would create a price squeeze because the federally tariffed ADSL price was lower than the sum of the prices of the inputs (such as loops and collocation) required for CLECs to offer competing DSL service; and (2) the fact that states govern the input pricing while the ADSL product was tariffed at the federal level would create challenges for federal and state policymakers in detecting and preventing price squeezes.

In its direct case, Pacific Bell states that it "fully expects that price squeeze issues will be raised before the appropriate regulatory body." Pacific Bell Direct Case at 15. NorthPoint simply suggests that federal and state regulators need to give some thought to this challenge, and to do so quickly, before ILEC price squeezes choke their CLEC competitors.

Price squeezes are a risk whenever CLECs must obtain unbundled network elements from ILECs in order to offer competing service. Price squeezes occur when the

² See, e.g., Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp., 7 FCC Rcd 1619 (1992) (Georgia Memory Call Decision). In that decision, in the context of examining who has jurisdiction when a voice mail service is accessed from out of state, the FCC asserted jurisdiction based on the ultimate termination of the call, rather than accepting the theory that there are actually two calls.

retail tariff rates are less than the cost to CLECs of obtaining the unbundled network elements required to compete plus any costs for competitively provided components, such as retailing costs.

Pacific Bell's proposed rates create a real price squeeze that threatens to throttle DSL competition before it starts. Pacific Bell manages to price this low because it fails to impute the UNE charges that CLECs must pay, including loop, collocation, and transport.

Pacific Bell's retail charges are as low as \$59 per month, with a non-recurring charge of \$125. By contrast, in order to compete in California, a DSL CLEC incurs the following costs:

It must pay Pacific Bell \$21.23 per month for a loop and cross connect, as well as a non-recurring charge of \$376.79;

It must pay Pacific Bell as much as \$100,000 per collocation cage plus \$600-1350 per month for collocation and power;

It must pay Pacific Bell or an alternative carrier for transport from the central office to a regional node;

It must recover the costs of its DSL equipment, retailing costs and overhead.

Without even taking into account the costs of the CLEC DSL equipment, Pacific Bell's full retail rate is less than the price it charges CLECs for the loops, collocation and transport necessary to provide DSL service. That is a price squeeze and must be remedied immediately to address the Commission's oft-stated concern for broadband alternatives.

For an equally efficient competitor to compete, Pacific Bell's retail price must equal or exceed the sum of the prices that Pacific Bell charges for xDSL-related UNEs.

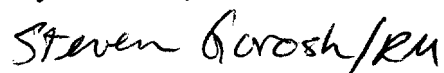
There are at least two ways to achieve this result. First, the FCC could require that ILEC DSL services be federally tariffed, and impose an imputation rule that ensures that Pacific Bell's rates include charges for loop, collocation and transport elements, imposed on CLEC competitors, in addition to charges that recover Pacific Bell's additional equipment and overhead costs. Alternatively, the FCC could defer to the states, and require ILEC DSL services to be tariffed at the state commissions, which have access to the underlying price information for unbundled network elements. Either approach improves the ability of federal or state decisionmakers to meet their goals of promoting competition, by detecting and preventing anticompetitive behavior including price squeezes.

Finally, if the FCC decides that the DSL tariffs should be filed with the FCC, it should reconfirm that ILECs are required to allow their competitors to resell DSL service at a discount. Section 251(c)(4) of the Communications Act imposes on ILECs "The duty (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. Sec. 251(c)(4). In the 706 Order, the Commission stated that "incumbent LECs have the obligation to offer for resale, pursuant to section 251(c)(4), all advanced services that they generally provide to subscribers who are not telecommunications carriers." ADSL service is provided to information service providers, which, under the Act, are not telecommunications carriers, and therefore falls under the rule established by the Commission. The Commission should clarify that the DSL service at issue in this tariff is subject to the resale requirement when provided by an ILEC and require the ILECs to file within 30 days a wholesale tariff that incorporates that discount.

This is particularly critical with respect to Pacific Bell, because the Public Utilities Commission of the State of California has allowed Pacific Bell's intrastate ADSL tariff to take effect. Pacific Bell argued that its ADSL service should be treated as special access, which is considered by the California Commission to be taken by carriers, and therefore available for resale but not subject to a wholesale discount.³ This is completely inconsistent with Pacific Bell's representations to this Commission that "work at home" customers will be served out of Pacific's intrastate tariff while ISPs will be served out of its federal tariffs.

NorthPoint understands that the FCC has not designated pricing issues in this investigation. The FCC should not, however, make a decision on the jurisdictional issues without a framework for resolving the significant pricing and other issues raised by this tariff. Rather, the FCC should decide the jurisdictional question in a way that supports the end game, which is to prevent price squeezes and other anticompetitive behavior by ILECs, in order to give the competitive forces a chance to work for consumers.

Respectfully submitted,



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³ Resolution T-16191, California Public Utility Commission, September 17, 1998.